Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Marlene Fearing, M.A. Fearing, Inc.
and Progressive Real Estate, Inc.,
Petitioners,

v.

Mary Parr, Robert Swenson, and Arlene Swenson,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 42 U.S.C. Section 3607 (1994), which is known as the Housing for Older Persons Exemptions ("HOP"); or is 42 U.S.C. Section 3607 as amended by the Housing for Older Persons Act of 1995 Pub L. 104-76, 109 STAT. 787 (December 28, 1995) which is known as HOPA the appropriate law to apply to the facts and circumstances of the Lake St. Croix Villas Homeowners Association for the purpose of determining whether the Association qualifies for an exemption from the Fair Housing Act?

2. If HOP is the law to be applied to the facts and circumstances of the Lake St. Croix Villas Homeowners Association, did the Association fulfill the three HOP requirements known as the:

    1. Facilities Test, and
    2. 80 Percent Test, and
    3. Publications Test

    to obtain the HOP Exemption from the Fair Housing Act?

3. If HOPA is the law to be applied to the facts and circumstances of the Lake St. Croix Villas Homeowners Association, did the Association fulfill the three HOPA requirements known as the:

    1. 80 Percent Test, and
    2. Intent Test, and
    3. Compliance Test

    to obtain the HOPA Exemption from the Fair Housing Act?

LIST OF PARTIES

The parties to Mary Parr, Robert Swenson and Arlene Swenson in their personal capacity and as members and representatives of Lake St. Croix Villas Homeowners Association, Inc. vs. Marlene Fearing et al. are Marlene Fearing, M.A. Fearing, Inc. and Progressive Real Estate, Inc. Petitioners and Mary Parr, Robert Swenson and Arlene Swenson, Respondents.

* M.A. Fearing, Inc and Progressive Real Estate, Inc. are not publicly held companies, and have no parent companies.

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STATUTES

42 U.S.C. Sections 3601-3631 (Fair Housing Act, "FHA")

42 U.S.C. Sections 3607(b)(2)(c)(i) and (iii) (1994)
(Housing for Older Persons Exemptions, HOP)

42 U.S.C. Section 3607(b)(2)(c)(ii) and (iii) as amended by the Housing for Older Persons Act of 1995, Pub. L. 104-76 109 STAT. 787 (December 28, 1995)
(HOPA)

The trial court ruled that HOPA was the law to be applied for the purpose of determining whether the Lake St. Croix Villas Homeowners Association qualifies for an exemption from the Fair Housing Act and that the Association fulfilled the three HOPA requirements known as the:

a. 80 Percent Test

b. Intent Test and

c. Compliance Test

to obtain the HOPA Exemption from the Fair Housing Act. The Trial Court held that the Association fulfilled the Three HOPA Criteria.

CITATIONS OF OPINIONS AND ORDERS BY COURTS

1. Trial Court Declaratory Judgment at Appendix A-1 with Memorandum of Law Judgment and Order dated April 30, 2004 at Appendix A-3. File No. C0-03-3415, Hon. Mary E. Carlson
2. Opinion of Minnesota Court of Appeals at Appendix A-34. File No. A04-1191 dated March 15, 2005 affirming lower court, Klaphake J.
3. Order Minnesota Supreme Court at Appendix A-44. File No. A04-1191 Alan Page, J dated May 22, 2005.

JURISDICTIONAL STATEMENT

1. The order of the Minnesota Supreme Court denying Petitioners petition for review was filed on May 17, 2005.
2. The United States Supreme Court has federal jurisdiction in this matter pursuant to 28 U.S.C. Section 1257.

STATUTES AT ISSUE

1. 42 U.S.C. Section 3607(b)(2)(C)(i),(ii), and (iii) (1994) provides:

> As used in this section, "housing for older persons" means housing (c) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:
>
> i. The existence of significant facilities and services specifically designated to meet the physical or social needs of older persons or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
>
> ii. that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
>
> iii. the publication of and adherence to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

2. 42 U.S.C. Section 3607(b)(2)(C)(i),(ii), and (iii) as amended in 1995 provides that housing for older persons means housing:

> intended for occupancy by persons 55 years of age or older and
>
> i. at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older,
>
> ii. the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
>
> iii. the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall
>
> I. provide for verification by reliable surveys and affidavits; and
>
> II. include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of Clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

STATEMENTS OF MATERIAL FACTS

On June 3, 1994 Appellant M.A. Fearing, Inc. whose President is Marlene Fearing, entered into a Developer's Agreement with the City of Lake St. Croix Beach ("Developer's Agreement"). On that same date, M.A. Fearing, Inc. executed a Declaration of Covenants and Conditions and Restrictions for Lake St. Croix Villas Homeowner's Association (Restrictive Covenants). The City

of Lake St. Croix Beach required M.A. Fearing to enter into the Developer's Agreement and execute the Restrictive Covenants before approving M.A. Fearing, Inc's development for 19 residential lots, which constitute the Lake St. Croix Villas Homeowner's Association (Association). The Appellants and their attorneys maintain that the Developer's Agreement and Restrictive Covenants violate the Fair Housing Act.

The Developer's Agreement at paragraph 4.I provides in relevant part:

> Building Permits. The Developer has secured permission from the City to construct three single family residences and eight side-by-side (common wall) duplex like structures. These structures have been designed and constructed to by marketed to seniors (persons of 55 years of age or greater) with the expressed purpose of providing a market for housing needs to the elderly and senior members of Lake St. Croix Beach Community. All of these dwelling units are to be occupied by no more than two adults each except as provided in accordance with the Homeowner's Association Bylaws...

In 1995, M.A. Fearing built a dwelling on Lot 19 for Appellant Marlene Fearing who was age 53 in 1995. Lot 19 is presently unoccupied.

In 1995, M.A. Fearing, Inc. built a dwelling on Lot 18 which was sold to Theodore Perlinger, who was over 55 years of age.

On October 27, 1995, M.A. Fearing, Inc. sold a dwelling which it built on Lot 16 to Respondent Mary Parr and her late husband Robert who were both over 55 years of age.

In March 1996, M.A. Fearing, Inc. sold a dwelling which it built on Lot 14 to Karen Sylte, who was under age 55.

On June 10, 1997, M.A. Fearing Companies Inc. filed a Voluntary Chapter 11 Bankruptcy Petition which soon thereafter was converted to a Chapter 7 Bankruptcy.

On December 26, 1997, the Bankruptcy Trustee sold M.A. Fearing Companies Inc.'s remaining undeveloped lots to Appellant Progressive Real Estate, Inc.

On April 29, 1998, Progressive Real Estate, Inc. sold a dwelling which it built on Lot 4 to Robert and Arlene Swenson who were over 55 years of age.

On April 19, 1999 Progressive Real Estate Inc sold a dwelling which it built on Lot 17 to Edith Ryan who was over 55 years of age.

On May 19, 1999, Progressive sold a dwelling which it built on Lot 5 to Diana Winters who was 48 years old.

In June 2001, Progressive Real Estate Inc. sold the remaining 11 undeveloped lots to Transaction Real Estate.

On June 5, 2002, Ms. Marsha Battles-Jenks, Deputy Commissioner of the Minnesota Department of Human Rights ("MN DHR") made inter alia the following factual findings and conclusions about the Association incident to a gender based discrimination case Fearing commenced entitled, In Re Marlene Fearing v. the City of Lake St. Croix Beach. Case numbers 33859 and 37909:

> 2.v. On March 19, 2001, the male developer [Transaction Real Estate] and his associate appeared before Respondent's city council. The associate explained that they had purchased the property [Progressive Real Estate, Inc.'s 11 lots]

and that they intended to change the association bylaws to comply with the Fair Housing Act.

4.e. They [Transaction Real Estate] not only announced their intention to remove the age and occupancy limits from the bylaws, the male developer agreed to ensure that all condominium documents complied with the Fair Housing Act.

Given the MNDHR's recognition and approval of Transaction Real Estate's promise that it would remove age and occupancy restrictions from the Association's bylaws and would otherwise comply with the FHA, the Appellant's belief that the Developer's Agreement and the Association bylaws and covenants that the City of Lake St. Croix Beach imposed on M.A. Fearing Inc. were in violation of the Fair Housing Act was confirmed. Transaction Real Estate did not cause the age and occupancy restrictions to be removed from the Association bylaws.

Subsequent to May 2001, Transaction Real Estate or its affiliates sold the following lots in Lake St. Croix Beach subdivisions:

Lot 6 – Completed in July 2002 and sold to Marco Ironi. Occupied by Jimmy Hanhe, age 28, since June 1, 2003.

Lot 7 – Completed in July 2002 and sold to Marco Ironi who sold on June 13, 2003 to Larry Hall, who was 53 and had occupied the premises since October 2002.

Lot 8 – Completed February 2003 and sold to Arthur and Heather Schwin, who sold it to Anthony Thooft, who is now the President of the Association but is considerably under the age of 55. The Association consented to his purchase.

Lot 9 – Completed February 2003 and sold to Brian and Terry Williams and occupied by Paul Haugh

Lot 10 – Completed October 2002 and sold to Clint Hetschler and sold to occupants Karen and Michael Hatle (age 31) on October 15, 2003.

Lot 11 – Completed October 2002 and sold to Clint Hetschler (age 40) and currently unoccupied

Lot 12 – currently unoccupied

Lot 13 – Completed July 2002 and occupied by Marlene Fearing

Lots 1, 2, 3 – owned by Progressive Real Estate and unoccupied.

The purpose of this litany is to demonstrate that the 80% threshold was never met, a fact acknowledged by the trial court.

On May 28, 2003, the Respondents brought a declaratory judgment Action supposedly on behalf of the Association, predicated on the Developer's Agreement, Restrictive Covenants, and Association bylaws to restrict the Association occupancy to those who are under 55 years of age or older. The Respondents did not claim to be victims of any discriminatory act. To the contrary, the Respondents seek to discriminate against those residing in the Association who are under 55 years of age.

The question then becomes that of when, if ever, the Appellants were discriminated against by the Association. The Association never attempted to restrict the Appellants from selling any of the lots they owned to a party under 55 years of age. In June 2001, Appellant Progressive Real Estate Inc. sold its remaining 11 lots to Transaction Real Estate. After June 2001, Transaction Real Estate sold 8 lots in the Association. Transaction Real Estate sold lots to purchasers under the age of 55 who in turn resold to purchasers under the age of 55. From June 3, 1994 until May 23, 2003, the Association stood idly by and did not enforce the restrictions

in the Developer's Agreement, Restrictive Covenants, or the Association's bylaws as to age or familial status.

On May 28, 2003, for the first time, the Association attempted to enforce the age and occupancy restrictions by bringing a declaratory judgment action. Curiously, the Respondent's sudden concern coincides with a black family moving into the development. Larry Hall and his family moved into the premises at Lot 7 on October 1, 2002. Mr. Hall's adopted children are black. While the declaratory judgment action is pending on December 12, 2003, the Association under the leadership of Respondents agreed to permit Anthony Thooft, who is under the age of 55 and white, to reside in the Development.

Since June 3, 1994, M.A. Fearing, Inc. and Fearing have always alleged that the Developer's Agreement, Restrictive Covenants, and the Association's bylaws violate the Fair Housing Act. The Appellants contend that the discrimination precluded by the FHA commenced at the time the Developer's Agreement, Restrictive Covenants, and the Association's bylaws became effective, which was prior to December 28, 1995 when HOPA became the law.

The Respondents rely on the June 3, 1994 Developer's Agreement, Restrictive Covenants, and the Association's bylaws as authority for restricting those who are under the age of 55 or have families from residing in the community.

The law on whether HOP or HOPA should be applied to the facts of the case is murky.

In Deer Hill Arms II Com'n 686 A.2d.974 (Conn. 1996), the trial court applied both the HOP and HOPA criteria. That case was ultimately decided based on the 80 percent rule, a condition or requirement of both HOP and HOPA Id. at 978.

In Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp 1394 (N.D. Ill. 1996), the Court applied HOPA criteria to the facts of a May 1995 case even though HOPA had yet to be enacted. Id. At 1402-03

In Gibson v. County of Riverside, 181 F. Supp. 1057 (C.D. Ca. 2002) at 1076 No. 16, the Court observes that in Covey v. Hollydale Mobilehome Estates, 116 F. 3d 830 (9th Cir. 1997), the Ninth Circuit held that any changes made by Congress' December 28, 1995 amendment to the statutory requirements that entities seeking to qualify as 55 or over, HOP must meet could not by applied retroactively. Id. at 839. Similarly, the Secretary states in the comments accompanying the April 2, 1999 regulations that the regulations should not be applied retroactively. See Implementation of the Housing for Older Persons Act of 1995. 63 Fed. Reg 16, 324, 16, 325 (1999) "Therefore, a matter involving a claim of alleged discrimination occurring before December 28, 1995 will be covered by those laws and regulations in effect at the time of the claimed violation." Id. at 1076 n. 16

Based on Gibson and the implementation of the Housing for Older Persons Act of 1995, because the age and familial discriminations alleged by the Appellants dates back to the 1994 documents, and because the Respondents' legal theory is tied to the language in the 1994 documents which the Appellants allege violate the Fair Housing Act, HOP is likely the appropriate law to be applied to the facts and circumstances of this case.

The facts show that the Association did not meet the facilities test. At no time has the Association provided services for the physical or social needs of older persons, nor has the association ever made available any amenities or facilities for older persons.

The facts show that the association did not meet the 80 percent test.

Finally, at no time before the commencement of this action has the Association ever published or provided any written materials to its members which would indicate that the Association intended that it by occupied only by persons 55 years of age or older.

Accordingly, the Association is not eligible for the HOP exemption from the Fair Housing Act.

REASONS FOR GRANTING THE WRIT

This matter is precisely as stated in Rule of the United States Supreme Court 10(b), where a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals.

Here the Minnesota Supreme Court upheld the application of HOPA to the facts of this case. It is clear from Gibson v. County of Riverside and Covey v. Hollydale Mobile Home Estates that the Ninth Circuit held that HOPA could not be applied retroactively.

This is in fact what the Minnesota Supreme Court did in affirming the lower court and the Minnesota Court of Appeal's retroactive application of HOPA to the facts of this case.

For all the foregoing reasons, Petitioners respectfully urge this court to grant their Petition for Writ of Certiorari.

Dated: August 15, 2005

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STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Mary Parr, Robert and Arlene Swenson, individually and on behalf of the Lake 5t. Croix Villas Homeowners Assoc.,

Plaintiffs, DECLARATORY JUDGMENT

File No. C0-03-3415

Theodore Perlinger, Marlene Fearing, M.A. Fearing Companies, Inc., and Progressive Real Estate, Inc., et al.,

Defendants.

The above-entitled matter came before the Court for.hearing on April 23, 2004.

This Court having considered all of the facts, documentation, and argument herein has concluded that-the Lake St. Croix Villas community was legally established pursuant to the Minnesota Common Interest. Ownership Act, Minn. Stat. Chap. 515B, and all lots therein are subject to the Declaration of Covenants and Restrictions, the Development Agreement, the Articles of Incorporation, and the Homeowners Association By-laws, together with the laws of the State of Minnesota as a common .interest ownership community.

The Court's Memorandum of Law dated April 30, 2004, is incorporated by reference. A copy of the Memorandum of Law and this Order shall be made a part of the records of the Homeowners Association and shall be accessible for review and copying as requested. A copy of the Order and Memorandum of Law shall also be provided to the City of Lake St. Croix Beach, Minnesota.

DECLARATORY JUDGMENT

1. Plaintiffs are hereby awarded Declaratory Judgment that the Lake St. Croix Villas community was established and remains in compliance with the Fair Housing Act, 42 U.S.C. §3607 and the. Minnesota Human Rights Act, Minn. Stat. §363.03 as housing for older persons. The restrictions on ownership (55 years of age or more) and occupancy (owner occupant only) are also valid and consistent with the Fair Housing Act, 42 U.S.C §3607 and the Minnesota Human Rights Act, Minn. Stat. §363.03, subd. 2. The restrictions on age and occupancy do comply with the exemption from discrimination against families because they are intended and designed to provide housing for older persons. The restrictions are further valid under the Minnesota Common Interest Ownership Act, Minn. Stat. §515B, et seq. The Lake St. Croix Villas Homeowners Association is therefore entitled to enforce the age and occupancy restrictions as originally established by the Declarant at the commencement of the development of the community.

2. The Washington County Court Administrator. shall mail a copy of this Order by U.S. Mail to the attorneys for the above-named parties. Such mailing shall constitute due and proper service of this Order for all purposes.

LET JUDGMENT BE -ENTERED ACCORDINGLY.

Dated: April 30, 2004 s/_____
Mary E. Carlson
Judge of District Court

Pursuant to Rule 58, Civil Rules of Procedures; I hereby certify that the above Order constitutes the judgment of this Court.
Christina M. Volkers
Court Administration

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Mary Parr, Robert and Arlene Swenson, individually and on behalf of the Lake 5t. Croix Villas Homeowners Assoc.,
Plaintiffs,

File No. C0-03-3415

MEMORANDUM OF LAW JUDGMENT, AND ORDER

Theodore Perlinger, Marlene Fearing, M.A. Fearing Companies, Inc., and Progressive Real Estate, Inc., et al.,
Defendants.

The above-entitled mattter came before the Court for hearing on April 23, 2004, on cross-motions for summary judgment and for dismissal of certain claims and/or counterclaims.

Jon E. Kingstad, Esq., appeared on behalf of Plaintiffs. Chad Lemmons, Esq., appeared on behalf of Defendant Perlinger. Mark J. Kallenbach, Esq., appeared on behalf of Defendants Fearing (individual), M.A. Fearing, Inc., and Progressive Real Estate, Inc.

Additional Defendants have benn added by Amended Complaint. Michael Aymar, as president of LSCBCO, LLC, and Transaction Real Estate, Inc., has been served with the Amended Complaint. According to the Amended Complaint, LSCBCO, LLC, is the name of an association, joint venture, and/or partnership composed of Marlene Fearing, Theodore Perlinger, M.A. Fearing Companies, Inc., Progressive Real Estaet, Inc., Transaction Real Estaet, Inc., Pro-Action Mortgage Corp., Minnesota Real Estate Specialists, Inc., Vista Construction, Inc., and various named individuals who appear to be non-resident owners of lots in the Lake St. Croix

Villas Development.[1] Brent R. Johnson, Esq., appeared on behalf of Clint Hetchler and Larry Hall. Sarah Aho, Esq., appeared on behalf of Aaron and Heather Schwinn. The Court has been advised that Michael Aymar has filed for bankruptcy.[2] Defendants have denied that there is a joint venture partnership.

This case arises out of the creation of a common interest ownership housing development in the City of Lake St. Croix Beach, Washington County, Minnesota, and the subsequent management of the Lake St. Croix Villa Homeowners Association. Suit was originally commenced on or about May 28, 2003, seeking a declaratory judgment with respect to Plaintiffs' rights under the Minnesota Common Interest Ownership Act (Minn. Stat. Chap. 515B) and the Development Agreement, Articles of Incorporation and By-laws of the Homeowners Association. Specifically, Plaintiffs sought a Declaratory Judgment under the Minnesota Common Interest Ownership Act with respect to the following:

a. Count I - The failure of the declarant, M.A. Fearing Companies, Inc., to:

1) Prepare and distribute annual reports (Minn. Stat. §317A.461, §5156.3-106);

---

[1] Marco Ironi (Lot 6); Aaron and Heather Schwin (Lot 8); Brian and Terry Williams (Lot 9); and Clint Hetchler (Lot 11). Lot 8 was recently purchased by Anthony Thoof.

[2] Chapter 7, Individual debtor (Pet. #03-46682). Aymar listed personal property to include sole ownership of Transaction Real Estate, a corporation that purchased Lots 1, 2, and 3 from M.A. Fearing on a contract for deed. Aymar stated that no payments on the contract were made and that the contract was canceled effective May 2002. The status of title to Lots 1, 2, 3, and 19 is in litigation. See Fearing v. Transaction Real Estate, et al., C3-03-6650 (receivership).

2) Hold annual meetings of the homeowners association;

3) Deliver funds, records, documents, and assets to an elected Board. (Minn. Stat. §515B.3-120, §515B.1-104) and

4) Provide adequate notice of a special meeting of the owners held on February 20, 2003 (Minn. Stat. §515B.3-108).

b. Count II - an attempt by Ms. Fearing to expel or suspend membership of Robert and Arlene Swenson in the Homeowners Association (Minn. Stat. §317A);

c. Count III - Declaratory judgment that Ms. Fearing had violated the terms and conditions of ownership in the Development:

1. That on or about May 14, 1999, M.A. Fearing Companies, Inc., and/or Progressive Real Estate purported to amend the Declaration of Covenants and Restrictions without notice to and consent of the unit owners. (Minn. Stat. §515B.2-112 and §515B.2-118), and

2. That commencing July 31, 2001, M.A. Fearing Companies, Inc., and/or Progressive Real Estate conveyed the undeveloped lots to third parties for non-residential investment - purposes in violation of the Declaration of Covenants (Minn. Stat. §515B.2-105, §Minn. Stat. §515B.3-112), and

3. That Fearing and/or her corporate entities had failed to pay assessments and interest through May 31, 2003, totaling $23,527.50.

The original parties' appeared with counsel at a hearing on June 2, 2003, at which time Defendant Perlinger filed and

served his Answer, and Ms. Fearing filed and served an Answer and Counterclaim raising as an affirmative defense that Plaintiffs' declaratory judgment. action was barred by Title 42 U.S.C. §3607. The Counterclaim sought a declaratory judgment that the language in the Articles of Incorporation of the Homeowners Association pertaining to age and owner occupancy violate the federal Fair Housing Act.

Both parties subsequently amended their pleadings. Plaintiffs have filed an Amended Complaint adding the names of persons and entities who appear on the Washington County real estate records as owners of Lots 1-3, 6-13, and 19, and amending issues as follows:

Count I - Consumer Fraud and False Advertisement, against Seniors (Minn. Stat. §§325D.44, 325F.67, 325F.69, and 325F.71) - Violation of the Minnesota Subdivided Lands Act (Minn. Stat. §83.44) and - Violation of the Minnesota Common Interest Ownership Act (Minn. Stat. §515B.4-116)

Count II - Declaratory Judgment under Fair Housing Act (42 U.S.C. §3601) and Minnesota Human Rights Act (Minn. Stat. §363, et seq. Count III - Defamation and Slander of Title

Count IV - Recovery of Unpaid Assessments

Plaintiffs seek equitable relief, monetary damages, punitive damages, assessments, and attorney fees. Minn.Stat. §515B.1-114. Defendant Fearing has filed a separate counterclaim asserting that the Homeowners Association owes her $28,750.00 for expenses she claims to have paid on behalf of the corporation.

On or about November 26, 2003, Defendant Theodore Perlinger filed a motion for summary judgment seeking

dismissal from this lawsuit. The motion was opposed and by Order dated January 27, 2004, the motion was denied on the grounds that there were issues of fact with respect to his role as a principal and/or affiliate of M.S. Fearing Co., Inc. The case then came before the Court for trial on March 1, 2004. The trial, however, was continued based on an agreement of the parties that the issues raised regarding the validity and enforceability of the June 1994 Declaration of Covenants, the Articles of Incorporation, and the Developers Agreement, which restrict ownership and occupancy of the twin villa townhomes to persons age 55 and over, should be resolved on cross-motions for summary judgment prior to trial on any remaining issues. See Order entered March 2, 2004. The parties have now filed their motions for summary judgment addressing the Fair Housing Act and other issues raised in the pleadings:

1. Plaintiffs have moved for summary judgment on Counts II and IV and for dismissal of Fearing's counterclaim for recovery of expenses.

2. The Fearing Defendants have moved for summary judgment on all counts and on their counterclaim for recovery of expenses.

3. Defendant Perlinger has moved for summary judgment on Counts II and IV.

History of the Lake St. Croix Villas Housing Development

The property at issue in this case is located off 15th Street South, just west of County Road 95 in Lake St. Croix Beach, Minnesota. In 1992, Theodore Perlinger purchased the property from Thomas Johnson and Johnson Construction and then transferred his rights and title under the purchase agreement to Marlene Fearing. (Perlinger claims that he acted

as the strawman because the Johnsons were not comfortable selling land to a woman.) In 1993, M.A. Fearing Company, Inc., applied for and obtained preliminary plat approval and a Planned Unit Development (PUD) for the Lake St. Croix Villas Development. Marlene Fearing is the president and sole shareholder of M.A. Fearing Company, Inc. On June 3, 1994, Ms. Fearing caused to be filed with the Washington County Recorders Office a Declaration of Covenants, Conditions, and Restrictions. She also filed Articles of Incorporation with the Minnesota Secretary of State for the Lake St. Croix Villas Townhomes Association under Minn. Stat. Chap. 317A. .

Of the nineteen platted lots in the Development, threewere designated for single-family homes and sixteen were designated for eight side-by-side twin homes. As of the date of this hearing, the three single-family lots (Lots 1, 2, and 3) have never been built on and remain vacant. The eight twin home units have been built. According to the Development Agreement which Ms. Fearing negotiated with the City, the single-family residences and the twin homes (duplex-like buildings with common walls) were:

> designed and constructed to be marketed to seniors (person of 55 years of age or greater) with the expressed purpose of providing a market for housing needs to the elderly and senior members of Lake St. Croix Beach community. All of these dwelling units, are to be occupied by no more than two adults each, except as provided in accordance with the Homeowners By-laws...

(Developer's Agreement, subd. 4-I, June 3, 1994). The Development was not considered to be a subsidized senior housing project. Instead, it was targeted towards moderate-income seniors, and the units were specifically designed "to the needs of seniors" (Developers Agreement). The

Association By-laws drafted-by Ms. Fearing's attorney further stated the units were "designed for the mature adult, therefore, no more than two occupants per unit will be allowed on a permanent basis.... A formal request must be submitted to the Board of Directors for additional occupancy." The Declaration of Covenants, Conditions, and Restrictions provides that each unit "must be owner occupied." (Article IX Section I). The Developers 'Agreement incorporated by reference the Articles of Incorporation, By-laws, and Declaration of Covenants and Restrictions, and the Declaration and the By-laws incorporated the Developers Agreement by reference. The Developers Agreement further provides at Section 4-0:

> ...Obligation of the homeowners association is referenced within the By-laws and incorporation documents... and the approved or allowed and permissible types of occupancy of the individual units shall not be modifiable or amended by the homeowners association or the Developer without the express written consent and approval of the City of Lake St. Croix Beach.

The first units were built and sold between 1995 and 1999 to individual owners who occupied their homes:

Unit 1 - Lot 19: was completed in 1995 and occupied by M.A. Fearing (now age 62). The unit is currently vacant and used as a model.

Lot 18: was completed in 1995 and sold to Theodore Perlinger (now age 70)

Unit 2 - Lot 17: was completed in 1999 and sold. to Edith Ryan on April 9, 1999 (now age 75)

Lot 16: was- completed in 1995 and sold to Robert and Mary Parr on November 9, 1995 (now age 65)

Unit 3 - Lot 15: was completed in. 1995 and sold to William and Phyllis Riley on October 27, 1995 (now age 81)

Lot 14: was completed in 1996 and sold to Karen Sylte on March 8, 1996 (age unknown). The property is now owned and. occupied by Kathryn Smith (age 75)

Unit 8 - Lot 5: was completed in 1999 and sold to Diana Winters on May 19, 1999 (now age 57)

Lot 4: was completed in 1998 and sold to Robert and Arlene Swenson on April 29, 1998 (now age 71).

During this period of time, Ms. Fearing was marketing the townhome villas as "housing for seniors." Her sales brochure stated:

> In analyzing recent demographic studies it becomes apparent that seniors constitute a large market whose housing needs have not been sufficiently met. During our extensive" research we found that traditional multi-housing designs create hardships such as stairways, as well as not lending themselves to the seniors needs. We also discovered that many senior housing projects that provide a wide array of on-site services result in high overhead costs to the seniors. Realizing these inadequacies, M.A. Fearing Companies created an adult community that is better suited to accommodate the seniors' changing needs in housing such as:
>
> - Quality maintenance-free exterior
> - Homeowners Association - ground maintenance
> - Single level design for easy access

- Zero-lot line for privacy

In general, seniors, if given a choice, prefer the one-story design because it allows them to live inn a secure, carefree community with their peer group. It also allows them the freedom to travel and enjoy their golden years.

From past experience with seniors we have found that most view leaving their single-family residence for a traditional senior high-rise as a loss of their respectful independent lifestyle. However, a move to a community such as-St Croix Villas which is a single level design with individual entryways appears to be less traumatic.

We at M & Fearing Companies have a strong commitment to construct affordable housing which meets the unique needs of the senior population.

(Fearing marketing brochure).[3]

Apparently, Ms. Fearing began to run into financial difficulties early on in the construction phase of the townhome units., It appears that she failed to pay taxes and legal and, administrative fees, which resulted in the denial, or a delay in the issuance of, building permits. (See Minn. Human Rights Dept. Order Case No. 33859 and 37909). In 1996, several contractors commenced foreclosure actions on their respective mechanic's liens for materials and labor. Judgment was entered against M.A. Fearing Companies and a motion for a new trial was denied in November 1997. [See Colburn v. M.A. Fearing Companies, Inc., 1998 W.L. 887456 (Minn. App. 1998)]. On June 10, 1997, M.A. Fearing Companies filed a Chapter 11 Bankruptcy Petition (for reorganization)

[3] This was not the first senior citizen housing development which Ms. Fearing attempted. See Fearing v. City of Hastings, 1997 W.L. 471318 (Minn. Ct. App. 1997) rev. denied (Oct. 21, 1997).

which was subsequently converted to a Chapter 7. Shortly before she filed for bankruptcy, Ms. Fearing obtained a loan for $475,000.00 and gave Mr. Perlinger a mortgage on the undeveloped lots.[4] The bankruptcy trustee found that Ms. Fearing and Mr. Perlinger were "insiders" for purposes of disallowing their claims. The trustee then sold the assets of the company (16 residential lots) to Progressive Real Estate, Inc., for an amount sufficient to pay the unsecured claims $40,000.00 plus costs of administration. The lots remained subject to the mortgage to Theodore Perlinger. Progressive Real Estate, Inc., is a corporation owned and controlled by Marlene Fearing. Perlinger's mortgage was ultimately satisfied in March 1999.

No other units were built between 1999 and 2001. In May 2001, Michael Aymar, doing business as Transaction Real Estate, purchased the vacant lots from Progressive Real Estate on a one-year contract for deed. One of the terms of the purchase agreement was that Aymar would build a townhome villa for Ms. Fearing on Lot 13 and that she would then transfer her interest in Lot 19 for use as a model home. It appears that another term of the purchase agreement was that Ms. Fearing would get the City to change the plat in order to allow duplexes to be built on Lots 1, 2, and 3. The City has not approved the modification and these lots remain vacant. According to Aymar's Bankruptcy Petition, the contract for deed on Lots 1, 2, and 3 was canceled in May 2002 for non-payment and ownership has reverted to Progressive Real Estate: (Ms. Fearing has disputed this allegation). Since 2001, the remaining eight units were constructed and sold.[5]

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[4] According to Mr. Perlinger, his cousin, George Grammer, loaned the money but Perlinger appears on the records as the mortgagee.

[5] In addition .to the mechanic's lien foreclosure cases, there have been a number of lawsuits brought in Washington County District Court with

Unit 7 - Lot 6: Completed in July 2002 and sold to Marco Ironi. Occupied by Jimmy Hahne since June-1, 2003 (age 28)

Lot 7: Completed in July 2002 and sold to Marco Ironi. Occupied by Larry Hall since October 1, 2002 and sold to Hall on June 13, 2003 (age 55)

Unit 6 - Lot 8: Completed February 2003 and sold to Arthur and Heather Schwin. Sold to Anthony Thoof with consent of the Homeowners Association on December 12, 2003.

Lot 9: Completed February 2003 and sold to Brian and Terry Williams. Occupied by Paul Haugh.

Unit 5 - Lot 10: Completed October 2002 and sold to Clint Hetschler. Sold to occupants Karen and Michael Hatle (age 31) on a contract for deed (Oct. 15, 2003).

Lot 11: Completed October 2002 and -sold to Clint Hetchler (age 40). Currently unoccupied (Fearing filed an affidavit by Hetchler in which he claims he has resided in the home since November 2002. This affidavit is false.)

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respect to St. Croix Villas: Fearing v. Transaction Real Estate, C3-03-6650 (Receivership); Aymar v. Fearing, CX-02-4559 (specific performance); LeVahn v. M.A. Fearing Co., C5-03-4463 (attorney lien); Fearing v. Aymar, C7-03-5131; and J.P. Morgan Bank v. Aymar, et al., C3-03-5435; Aymar v. Fearing, C7-02-5250 (unlawful detainer); Aymar v. Fearing, C9-02-4519; Fearing v. Coumoyer; St. Croix Lakes Villa Housing Assoc. v. Hetchler, C5-03-2793 (suit to enjoin owner from renting-voluntary dismissal). In Fearing v. Transaction Real Estate, Ms. Fearing alleged that the Aymars transferred assets (title to lots) into names of individuals and corporations to defraud creditors.

Unit 4 - Lot 12: Completed July 2002 and owned by Vista Construction Currently unoccupied.

Lot 13: Completed July; 20.02 and currently owned and occupied by Marlene Fearing (now age 62).

Plaintiffs claim that Defendants are converting or attempting to convert the marketing and development plan from a common interest senior housing development into a joint venture for real estate/rental property investment. Defendants have denied these allegations and assert that the restrictive covenants with respect to age (55 and older) and occupancy (owners only) are illegal and unenforceable under federal and state law. Defendant Perlinger specifically denies that he had any involvement in the development of the community other than acting as a strawman for Ms. Fearing and being a property owner, and further denies making any representations to Plaintiffs regarding the status of the community as being restricted to mature adult owner/occupancy.

A. Declaratory Judgment - Count II

Count II of the Amended Complaint seeks relief in the nature of a declaratory judgment-that the restrictions on ownership and occupancy are valid and consistent with the Fair, Housing Act, 42 U.S.C. §3607, et seq., and its counterpart, Minn. Stat. §363.03, subd. 2, and that the restrictions on age and occupancy comply with the exemptions from discrimination against families as "housing for older persons."

The parties agree that the issues raised in Count II are appropriate for resolution under the Minnesota Declaratory Judgment Act, Minn. Stat. §555.02, in that the rights of the parties are - affected - by federal and state statute and there is

a justiciable controversy between persons with adverse interests. See St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585, 587 (Minn. 1977); Thuma v. Kroschel, 506 N.W.2d 14, 20 (Minn. App. 1993) rev. denied (Dec. 14, 1993); Rupp. V. Mayasich, 561 N.W.2d 555, 557 (Minn. App. 1997). The parties have submitted cross-motions for summary judgment with supporting affidavits and documentation. The establishment of an exemption to the Fair Housing Act provisions regarding discrimination based on familial status requires a fact-specific analysis. Summary judgment is generally not granted if there are genuine issues of material fact. Plaintiffs have challenged the affidavits submitted by Ms. Fearing on grounds of hearsay and self-serving opinions as to the enforceability of the restrictive covenants. This Court has reviewed and considered all of the information provided by the parties, has made determinations with respect to relevance, materiality, and other evidentiary issues, and has concluded that there are no genuine issues of material fact so as to preclude resolution of the, issues presented in conjunction with Count II under Minn. R. Civ. Proc., Rule 56.

The St. Croix Villas Development was created by Ms. Fearing, d/b/a M.A. Fearing Companies, Inc., within the statutory context of the Minnesota Common Interest Ownership Act, the Minnesota Human Rights Act, Minn. Stat. §363.03, and the Fair Housing Act (1994) exemption for age 55 and older housing: The Minnesota Human Rights Act was amended in 1980 to preclude familial status discrimination while exempting adults-only and elderly housing. See State v. Khalifa v. Parkshore Estates, Inc., 413 N.W.2d 269 (Minn. App. 1987) rev. denied (Dec. 18, 1987). "The legislative exceptions permit total exclusion of families in certain situations."

The Minnesota Common Interest Ownership Act, Minn. Stat. §515B (1994) applies to condominiums, cooperatives, and planned communities created on or after June 1, 1994. Under this Act, a common interest community may restrict use, occupancy, and alienation of units within the community. Ms. Fearing, as the Developer, recorded the Declarations of Covenants and Restrictions on each lot and began marketing the townhome units to persons age 55 or older, including Plaintiffs Parr and Swenson, Defendant Perlinger, and others. The restrictions in the Declaration and By-laws provide that 1) the units must be owner-occupied, 2) the dwellings are to be occupied by no more than two adults each except as allowed under the Association By-laws, and 3) the units are to be marketed to persons 55 years of age or greater. The entire development was intended for persons age 55 or older (100%) and Fearing's clear intent was to provide housing limited to this age group. Covenants restricting the use of property are enforceable by other property owners who are subject to the same restrictions. Owners have a property interest in the. Covenants applicable to the Development. See LaValle v. Kulkay, 277 N.W.2d 400, 403 (Minn. 1979); Burger v. City, of St. Paul, 64 N.W.2d 73, 82 (Minn. 1954). Defendants, including Ms. Fearing, now assert that these restrictions violate the Fair Housing Act because there were no "facilities and services designed to meet the needs of older persons," there was no publication of policies and procedures, and the units never met the 80 percent occupancy test. They argue that the restrictions should therefore be voided and held unenforceable.

The Fair Housing Act, 42 U.S.C. at §3607, prohibits certain discriminatory housing policies when based on race, color, religion, gender, or national origin. In 1986, congress added "familial status" (persons with children) to the list of

prohibited practices, but at the same time made an exception for "housing for older persons" HOP). There are three types of HOP's which are exempted from the FHA's prohibition familial status discrimination: housing designed and operated to assist elderly people [§3607(b)(2)(A)]; housing intended for and solely occupied by persons age 62 and older [§3607(b)(2)(B); and housing intended for and operated for occupancy by at least one person age 55 years or older per unit [§3607(b)(2)(C)]]. With respect to this last category of exempt housing, Congress originally established three threshold requirements that had to be met:

1. The Facilities Test - The existence of significant facilities and services specifically designed to meet the needs of older persons;

2. The 80 Percent Test - At least 80 percent of the units are occupied by at least one person age 55 years of age or older; and

3. The Publication Test - The publication and adherence to policies and procedures demonstrating an intent by the owner or manager to provide housing for persons age 55 or older.

The Housing for Older Persons Act of 1995, Pub. L. 104-76, 109 Stat. 787 (Dec. 28, 1995), referred to as HOPA, amended the original HOP exemption to preserve and promote housing for older persons. See Taylor v. Rancho. Santa Barbara, 206 F.3d 932, 936 (9th Cir. 2000).

> Congress intended the FHAA [(1995)] to protect families with children while still 'fully protect[ing] the rights of senior citizens who live in retirement communities and. allow[ing] those communities to exclude families with children if they so choose." 134 Cong. Rec. H4603 at H4607 (daily ed. June 22, 1998).

Taylor, supra at 936

Under HOPA, a senior housing community is now required to show that:

1. 80 Percent Test - At least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

2. The Intent Test - The facility or community publishes and adheres to policies and procedures that demonstrate the intent to provide housing for seniors.

3. Compliance Test – The community must be able to provide verification that it meets the 80 percent rule.

42 U.S.C. §3607 (b)(2)(C).

In its Final Rule for Implementation of HOPA, HUD discussed the rationale for the amendment. See 64 Fed. Reg. 16325 (April 1, 1999):

> The Housing for Older Persons Act (HOPA) was a remedial amendment to the Fair Housing Act overwhelmingly passed by Congress in an attempt to clarify the Act's senior housing exemption which Congress found was being effectively repealed by the judicial and administrative interpretation which the exemption had received.... Senate Report #104-172 describes the purpose as a "return to the original intent of the Fair Housing Act exemption Congress created in 1988. HOPA is designed to make it easier for a housing community of older persons to determine whether they qualify for the Fair Housing Act exemption." While House Report 104-9.1 states "Legislation is necessary to establish a workable and fair exemption to protect senior citizens who wish to live in retirement community" [sic]. In short, HOPA was passed in order to-protect senior housing...

> Those who maintain that HUD's interpretation of the exemption should be narrowed ignore the history of the senior housing exemption and HOPA. Congress made explicit findings that HOPA was necessary because of the narrow construction afforded the senior housing exemption, in the past. It would be contrary to the intent of the HOPA to abolish the "significant facilities and services" requirement .that hindered senior housing only to construct new impediments by strictly construing the remaining requirements.

Defendants are asking the Court to narrowly construe and apply the HOPA criteria in order to defeat the original intent of creating a residential community for senior citizens. As noted above, HOPA is a remedial amendment to the FHA passed by Congress to protect senior housing. See 64 Fed. Reg. 16324, 16325. As a remedial act, HOPA is entitled to liberal construction and application to protect the interests of the senior homeowners This is particularly appropriate where, as here, the original buyers were age 55 or more and relied upon representations that the community would be restricted to that age group.

1. 80 Percent Criteria

This is not a case where an existing facility or homeowners association is attempting to change its rules to obtain the exempt status of an HOPA. According to the Development Agreement, 100 percent of the community was intended for ownership and occupancy by persons 55 years of age, or older. From 1994 to June 2002, seven townhomes were completed and were owned and occupied by persons 55 years of age or older, including Defendants Perlinger and Fearing. One townhome was purchased in 1999 by Diane Winters when she was 52 years of age. She continues to reside in her

townhome. Of the eight units occupied as of June 2002, 100 percent were owned and occupied by persons 55 years of age or over.

HUD had previously adopted rules implementing HOPA to provide a mechanism for returning a former senior community to senior status where the community had abandoned senior status "for fear of lawsuits spawned by the pre-HOPA interpretations of the exemption, especially the requirement that significant facilities and services be provided, or for reasons which Congress found were contrary to the original intent of the exemption." The new rules (adopted in 1999) provided for a similar transition period.

> The Act provides that a. property "shall not fail to meet the requirements for housing for older persons by reason of ... (B) unoccupied units..." 42 U.S.C. §3607. HUD believes it is justified in interpreting the Act to allow a community which, although it does not currently meet the 80% occupancy requirement, to reserve all unoccupied units for occupancy by a person 55 years of age or older. This may be the only way for a community which believed that it was ineligible for "housing for older persons" status, and which therefore permitted occupancy by families, to qualify for the exemption.

The transition period was limited to a period of one year from the date the 1999 regulations became final, "to allow communities which wish to qualify for the 55 and older exemption to qualify." See 64 Fed. Reg. 16326.

While Fearing argues that she was justified in selling the undeveloped lots to third parties in 2001 because the St. Croix Villas could not meet the HOP requirements her argument cannot be sustained based on HOPA and the HUD rules that were adopted in 1999. She was in fact still actively marketing

the townhomes to persons age 55 and over through 1999. (Lots 4, 5, and 7 were completed and sold in 1998 and 1999 and two of those lots were sold to people over age 55.) There was nothing to preclude Ms. Fearing or Mr. Aymar from restricting sales and occupancy to persons age 55 and over.

For purposes of determining whether the community meets the 80 percent requirement, this Court will consider the status of the property as of commencement of this lawsuit, May 28, 2003.[6]

1. Eight townhomes were owner-occupied-for all eight townhomes, at least one of the occupants was over age 55;

2. Five units were occupied by renters;

3. Three units were vacant-of these units, two are owned by developers and one was listed for-sale by the non-resident;

4. Three lots were undeveloped.

Based solely in terms of occupancy of available units, the community does not meet the 80 percent requirement. Based solely in terms of ownership, the community still does not meet the 80 percent requirement.[7] Neither the FHA or the HUD rules, however, preclude a community from entering into private contractual agreements or deed restrictions which are legally enforceable under state law or practice. See 65 Fed.

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[6] Four units (Lots 6, 7, 8; and 10) were sold since the commencement of this lawsuit. Only one of the owners meets the age requirement but Plaintiffs assert that the number of occupants in that home exceeds the number allowed in each unit under the terms of the Development Agreement and Declaration of Covenants.

[7] Based on occupancy, one renter was age 55 giving the community 69% age 55 or over. Based on ownership, two lots were owned by the developer and were therefore available for sale to a person age or over, giving the community 77% ownership over age 55.

Reg. 16326. The St. Croix Villas is a "limited occupancy" community in that occupancy is restricted by the Declarations, By-laws, and Development Agreement to two owner-occupants per unit. This limitation on occupancy is not precluded by the FHA-HOPA and is enforceable under Minn. Stat. §515B. 42 U.S.C. §3607(b)(1.) provides in pertinent part as follows:

> Nothing in this subchapter limits the applicability of any reasonable local state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

Restrictive covenants which prohibit occupancy by renters or non-owners have been sustained as reasonable restrictions of use or alienation in' Minnesota. See Burger v. City of St. Paul, 241 Minn. 285, 299, 64 N.W.2d 73, 81 (1954); 241 Minn. 285, 299, 64 N.W.2d 73, 81 (1954); Breezy Point Holiday Harbor v. B.P. Partnership, 531 N.W.2d 917, 919 (Minn. Ct. App. 1995). The townhomes which were occupied by renters or by more than two adults in violation of the Lake St. Croix Villas' restrictions on occupancy are not to be considered in the context of the 80 percent rule. To hold otherwise would allow a developer to unilaterally modify the senior housing community by selling units in violation of the age and occupancy restrictions causing the community to lose its HOPA exemption. This Court, therefore concludes that 100% of the owner-occupied residences on May 28, 2003, met the age 55 or over criteria.

2. Policies and Procedures - The Intent Test

42 U.S.C. §3607(b)(2)(C)(ii)(2003) requires a showing that "the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent [to meet the HOPA exemption]." The "policies and procedures"

criteria can be et based upon consideration of the following list of non-exclusive factors:

1. The manner in which the housing facility is described to prospective residents;

2. The nature of the advertising designed to attract prospective residents;

3. Written rules, regulations, covenants, deed or other restrictions;

4. Actual practices of the owner or manager in enforcing relevant rules and regulations. 24 CFR §100.305(e)(5) and 100.306(a)(2003).

In this case, Ms. Fearing, as the developer, published her intent to provide housing for persons over 55 years of age through her Development Agreement with the City, which was incorporated into the Declaration of Covenants and Restrictions recorded on the property. She actively marketed the property to persons age 55 and over, and the first eight townhomes were in fact sold to and occupied by persons age 55 and over, with one exception, evidencing her intent through 1999. The Court finds that the Declaration and Development: Agreement and original marketing of the property demonstrates an intent to restrict ownership in the residential townhome community to persons age 55 or over and satisfies the rules and procedures requirement. Defendants will be estopped from relying on their own failure to advise potential buyers that the townhomes were restricted to ownership and occupancy by persons age 55 or older in order to now destroy the HOPA exemption.

3. Compliance Test

The Fair Housing Act as amended by HOPA retained two to the original requirements-80 percent occupancy and

documentation showing intent to meet the exemption-and then added a new requirement that the community be able to verify compliance with the HUD rules. 42 U.S.C. §3607(b)(2)(C)(iii). No particular type of documentation is required.

> It is HUD's position that the test is-whether 80% of the occupied units are, in fact, occupied by persons 55 years or older. This need only be documented through reliable survey, census or affidavit, or other documentation: which confirms that the 80% threshold is being met. A self-certification of his or her age by an individual will be adequate to meet this standard. An affidavit from someone who knows the age of the occupant(s) and states his/her basis for the knowledge is sufficiently reliable to satisfy the statute. To hold otherwise would effectively allow 21% of a senior community to destroy the exemption by not cooperating with verification procedures.

64 Fed. Reg. p.16327.

Defendants argue that since 1994, the Association has never had an effective procedure in place to ensure compliance with the regulatory prerequisites for housing for older persons under HOP or HOPA and that Plaintiffs' attempt to conduct a survey in October 2003 was inadequate for purposes of meeting the Verification of Compliance requirement.

As the Declarant and controlling member of the Homeowners Association[8] and the Board of Directors, Ms. Fearing had a fiduciary duty to the homeowners to insure that

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[8] M.A. Fearing Companies, Inc., as the Declarant, was entitled to control the Association for a maximum of three years from the date of the first sale of a unit, i.e., until April 1, 1998. Minn. Stat §5158.3-103(c). The "Declarant" is defined in the By-laws to include successors or assigns who acquire one or more undeveloped lots for purposes of development.

the Developer (M.A. Fearing Companies) and the Association met the HOPA requirements: She breached that duty by failing to implement any age verification procedure and will be estopped from now asserting that the lack of a procedure to verify age, by itself, defeats the community's exempt status. Michael Aymar (and his corporate entities) was similarly obligated to, the homeowners as the successor declarant/developer to adhere to the Covenants and Restrictions. Instead, both Fearing and Aymar failed to relinquish control of the Association and further allowed additional units to be sold to non-resident and resident owners under age 55.

The failure and/or refusal of Ms. Fearing to relinquish control of the Homeowners Association and to enforce the restrictions on owner-occupancy caused Plaintiffs to commence this action. Pursuant to Court Order dated June 12, 2003, an Association meeting[9] was held on July 22, 2003. Retired Judge Kenneth Maas presided over the meeting and a Board of Directors was elected. Following the meeting, the new Board of Directors -met and. elected officers. Judge Maas submitted a report to the Court consisting of the minutes of the meeting.[10] The-duly elected Board has since attempted to comply with the HUD rules for verification of age by handing out a survey-questionnaire on or about September 23, 2003.

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[9] The following homeowners attended the meeting: Perlinger, Fearing, Parr, Arlene and Robert Swenson, Winters, Ryan, Riley, Smith, Muellner, Mark Aymar, Marlene and Larry Hall, and Hetchler.

[10] On November 18, 2003, the Court had to issue an Order enjoining Defendants Fearing and Perlinger from interfering with the management and control of the Association. On January 17, 2004, some of the new homeowners attempted to take control of the Association. Mr. Hall is currently claiming that he is the president. This Court made it clear to everyone appearing for trial on March 1 that the only properly held and recognized Association meeting during the pendency of this litigation was the one held on July 22 pursuant to Court Order.

The Board's efforts were unsuccessful. However,, both parties have submitted affidavits regarding the ages of the occupants and owners of the various townhomes and none of these affidavits have been contested. The Court is therefore able to ascertain the age of the owners/occupants (only one of whom has to be age 55 or over, in 80% of the occupied units, to meet the compliance requirements). As to the prior lack of verification, none was ever required as this is the first challenge made under HOPA, but Defendants will be estopped from relying on their own failure to meet the verification requirement.

4. Two Additional Arguments by Defendant Fearing

a. Minnesota Department of Human Rights

Defendant Fearing has suggested in her memorandum and argument that a deputy commissioner of the Department of Human Rights has already conclude that the Association's By-laws do not comply with the Fair Housing Act. She rests this contention on two findings of fact reached by the deputy commissioner in her ruling on Ms. Fearing's allegations of sex discrimination (REF33859) and reprisal (REF37909) which she brought against the City of Lake St. Croix Beach in 2002. Ms. Fearing's reliance on these two findings of fact regarding comments and/or alleged commitments made by Michael Aymar is unwarranted. The specific issues presented to the Department concerned the City's denial of building permits for failing to pay taxes and fees and had nothing to do with whether or not the St. Croix Villas was exempt from the FHA as housing for older persons. At best, these findings establish that the successor developer (Aymar) was aware of the restrictions on age and occupancy contained in the Lake St. Croix. Villas Declaration and By-laws when he purchased the undeveloped lots in 2001

b. Bankruptcy

Ms. Fearing also makes the following statement in support of her motion for summary judgment:

> Plaintiffs contend that the Minnesota Common Interest Ownership Act precludes. Declarant and Successors from repudiating implied, warranties of lawful residential use. From a pure legal. perspective, this issue is likely a non-issue. The Declarant, M.A. Fearing Company, a Minnesota corporation, filed for bankruptcy protection in June 1997. The Developers Agreement which contains the language upon which the Plaintiffs base their Minnesota Common Interest Ownership Act claim is likely barred by bankruptcy law.

This last statement is unsupported, and unsupportable, both factually and by law.

Count III - Slander of Title

Count III of the Amended Complaint asserts a cause .of action for slander of title with respect to Plaintiffs' ownership and interest in enforcing their rights under the senior common interest community. To this cause of action, Defendants have moved for dismissal and/or summary judgment on the grounds that Plaintiffs have failed to allege summary judgment with respect to Slander of Title facts necessary to state a claim for Slander of Title. Plaintiffs have also moved for summary judgment with respect to Slander of Title.

Both parties concur that the elements of a Slander of Title claim include the following:

1. That there was a false statement concerning the real property owned by the plaintiff;

2. That the false statement was published by others;

3. That the false statement was published maliciously; and

4. That the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages.

Paidar v. Hughes, 615 N.W.2d 276, 279-280 (Minn. 2000). Plaintiffs assert that the cloud on title arises out of Defendants' statements that the Homeowners Association and the individual Plaintiffs are committing racial discrimination by seeking to uphold and enforce restrictions on occupancy and ownership. Plaintiffs are seeking an award of attorney fees and costs.

As the Supreme Court in Paidar explained, "the filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander of title." Paidar at 280 citing Kelly v. First State Bank of Rothsay, 145. Minn. 331, 332, 177 N.W. 347 (1920). The cause of action is not premised on wordswhich might constitute slander or defamation of a person, but rather is in the nature of trespass. "The cause of action is denominated slander of title by a sort of figure of speech in which the title is personified and made subject to many of the rules applicable to personal slander when the words themselves are not actionable." Quevli Farms, Inc. of Lakefield v. Union Savings Bank v. Trust Co. of Davenport, Iowa, 178 Minn. 27, 29 226 N.W. 191 (1929).

Plaintiffs have not produced, or alleged, any facts to support a claim for Slander of Title. The cause of action in Count III will be dismissed.

Count IV - Recovery of Assessments

Plaintiffs have moved for summary judgment against Defendants with respect to Count IV of their Amended Complaint which asserts that Marlene Fearing, her corporate

entities, and Theodore Perlinger as her affiliate, owe the Homeowners Association in excess of $23,000.00 for unpaid assessments plus interest and penalties. Defendant Perlinger has asserted that he cannot be held personally liable for any unpaid assessments owed by Declarant and moves to dismiss this claim as to himself. Defendant Fearing asserts that there was an agreement reached between herself and the Homeowners Association in 1999 whereby she waived her claim for $28,750.00 and the Association waived its claim for assessments. She further states that she had agreed to provide lawn services and snow removal for the lots that she and her companies owned. Finally, she argues that she sold the undeveloped lots to Michael Aymar in June 2001. She therefore asserts that this claim is not appropriate for disposition on a motion for summary judgment because there are issues of material fact as to who is liable, if anyone, for assessments on the platted lots in St. Croix Villas from April 1995 to date, and particularly, Lots 1, 3, 6-13, and Lot 19.

The Minnesota Common Interest Ownership Act provides in pertinent part as follows:

> 515B.3-116(a).
> The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. . .Unless the declaration otherwise provides fees, charges, late charges, fines, and interest, charges pursuant to Section 515B.3-102(a)(10), (11) and (12) are liens, and are enforceable as assessments, under, this section.
>
> 5158.3-116(e)
> The unit owner of a unit at the time an assessment is due shall be personally liable to the association for payment of the assessment levied against the unit. If there are multiple

owners of the unit, they shall be jointly and severally liable.

The Declaration of Covenants and Restrictions, Article IV, provides as follows:

> The Declarant, for each Lot owned within the Properties, hereby covenants, and each Owner of any Lot... shall be deemed to covenant and agree with each other and. with the Association to pay to the Association... general annual assessments and special assessments for capital improvements... [which] shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made....[and] shall also be the personal obligation of the person who was, the Owner of such property at the time when the assessment fell due....

The purpose of these assessments was to promote the health, safety, and welfare of the residents and for the improvement and maintenance of common areas, driveways, insurance premiums, if any, and taxes imposed on common areas, if any. Section 9 provides that "No owner may waive or otherwise escape liability for assessments provided herein by non-use of the Common Area or abandonment of his Lot." In addition to maintenance of the common area, the Homeowners Association was empowered to enter into a professional management contract, and obtain and pay for legal and accounting services. The Association was also to arrange for snow removal, lawn care, and other common services to the Owners, Article V. See also, Association By-laws, Section 3.

Titles to the lots have been transferred to various corporate entities controlled by Marlene Fearing and Michael Aymar and title to some of the lots has been transferred to named individuals who have not been served or who have not appeared (ownership of the lots may be contested). There are

issues of material fact as to the amounts owed, if any, who is liable for the assessments, and whether or not certain assessments have been waived.

Fearing Counterclaim - Recovery of Expenses

Ms. Fearing has asserted a counterclaim against the Homeowners Association for expenses she allegedly paid on behalf of the Homeowners Association totaling $28,750.00. Ms. Fearing has moved for summary judgment on this claim and Plaintiffs have moved for dismissal on grounds of the Statute of Frauds. Ms. Fearing claims that, in 1999 she and the Homeowners Association, of which she was the President, negotiated an. arms-length agreement whereby she agreed to waive her claim for $28,750.00 in exchange for the Association waiving any claims that it had against her and/or her corporation for assessments, together with her agreement that she would provide her own lawn and snow removal. She claims that this agreement was memorialized in the Association minutes. She has not produced any written documentation of this agreement. She relies on her own affidavit, and Mr. Perlinger stated to the Court that he would testify that there was an agreement.

Minn. Stat. §513.01 provides as follows:

> No action shall be maintained ... upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith: [including] (2) every special promise to answer for the debt, default or doing of another.

Ms. Fearing has failed to produce any contemporary accounting detailing what the alleged expenses were for, when they were incurred, or why the Association was liable for

these expenses in the first place. She has further failed to present a written agreement, note, or memorandum to show that the Association acknowledged a debt for these claimed expenses or agreed to set-off Ms. Fearing's claim against her obligations as the Developer and owner of the various lots to pay the assessments due prior to or after 1999. Plaintiffs' motion to dismiss Fearing's counterclaim will be granted.[11]

Count I - Consumer Fraud

Defendant Fearing has moved for summary judgment on Count I of the Amended Complaint which alleges that Defendants [as subdividers under Minn. Stat. §83.20, subd. 12 and as declarants under Minn. Stat.§515B.1.-103(1)] offered for sale to the public, property described and represented as being a common interest ownership community for senior citizens and that after selling lots to Plaintiffs and other senior citizens, they attempted to eliminate certain restrictions pertaining to age and occupancy and to defeat the community's exemption from the Fair Housing Act by conveying lots to non-resident buyers under age 55 for use as investment and/or rental properties.. Plaintiffs allege that Defendants' conduct constitutes fraudulent and deceptive practices perpetrated against-senior and handicapped persons in violation of:

1. The Deceptive Trade Practices Act - Minn. Stat. §325D.44;
2. The False Advertising Act - Minn. Stat. §325F.67;
3. The Deceptive Practices Act - Minn. Stat. §325F.69;

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[11] It appears from the documents submitted in this case that Ms. Fearing did not mow or plow as she claims she agreed to do. Apparently, the City received complaints regarding weeds on Ms. Fearing's property and her failure to plow or properly sands streets.

4. The Deceptive Acts Against Senior Citizens and Handicapped Persons Act - Minn. Stat. §315F.71;

5. The Minnesota Subdivided Lands Act - Minn. Stat. §83.44; and

6. The Minnesota Common Interest Ownership Act – Minn. Stat. §515B.4-116.

Plaintiffs seek equitable and monetary relief, including an injunction to preclude the rental of property in the residential community and the sale of lots to persons under age 55. Plaintiffs also bring this claim personally and within the context of a civil suit available under Minn. Stat. §8.31 subd.3a, which - provides for equitable relief, damages, and reasonable attorney fees.

Defendant Fearing has moved for summary judgment as to Count I on the rounds that Plaintiffs cannot meet their burden of establishing each of the elements for a common law cause of action for false representation. Specifically, she contends that she never made an untrue statement of fact on which Plaintiffs reasonably relied and that Plaintiffs' cannot prove damages because their property values have increased since their dates of purchase. Plaintiffs have opposed the motion for summary judgment on Count I, arguing that a breach of express or implied warranties regarding the age and occupancy restrictions for the St. Croix Villas community does give rise to a violation of the Minnesota Consumer Fraud Act. Fearing's theory of dismissal was addressed in State by Humphrey v. Alpine Air Products, 500 N.W.2d 788 (Minn. 1993), in which the Minnesota Supreme Court stated:

> In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's

intent is evidenced by the elimination of elements. of common law fraud, such as proof of damages or reliance on misrepresentation.

Id. at 790.

Defendant Fearing also moves for summary judgment on the grounds that the applicable Statute of Limitations started to run at the time of the sale of the lots to Plaintiffs and that their claims are barred by the three-year statute of limitation. Under Minn. Stat. §5-15B.4-115(b), the statute of limitations begins to run when the warranty is breached. Plaintiffs assert that that triggering event did not occur until 2001 when Fearing sold her interest in the undeveloped lots to the new developer.

The Court need not discuss the various theories of recovery set forth in Count 1.[12] Issues pertaining to the running of a. statute of limitations, piercing the corporate joint venture, representations, breach of warranty, personal liability of principals and/or affiliates, and damages will all involve issues of fact. Based upon the record now before the Court, those issues of fact preclude consideration of Defendants' motion for summary judgment on Count I.

Plaintiffs' Claim for Attorney Fees.

Plaintiffs have moved for summary judgment on the issue of attorney fees, requesting an award of $33,000.00 incurred in maintaining an action to terminate the Declarant's control of the Homeowners Association (Minn. Stat. §515B.3-104) and in enforcing the Developers Agreement and other related documents, against defenses raised by Defendants that the

[12] The Court notes, however, that Minn. Stat. §325D.44 does not appear to be applicable since the scope of the statute is limited to representations with respect to the origin of goods and services being offered for sale (false use of trademarks and trade names).

community is unable to establish that it is an exempt housing for older persons community under the Fair Housing Act and the Minnesota Human Rights Act.

The Court notes at the outset that this issue can only be considered with respect to the originally named Defendants. While the Amended Complaint adds new individual and corporate entities, they have only recently been served and have not actively participated in the litigation as of the date of the hearing. Further, this claim can only be considered in the context of Count II since Count III will be dismissed and Count I and Count IV have not been resolved on these motions.

Minn. Stat. §515B.4-116 provides as follows:

a. In addition to any other rights to recover damages, attorney fees, costs or expenses, whether authorized by this chapter, or otherwise, if a declarant or any other person violates any provision of this chapter, or any provision of the declaration, by laws, or rules and regulations, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The association shall have standing to pursue claims on behalf of the unit owners of two or more units.

b. The court may award reasonable attorney fees and costs of litigation to the prevailing party...

Plaintiffs are the prevailing parties on the key issues raised by Defendants in this case. By Court Order, the efforts of Ms. Fearing and Mr. Perlinger to seize or maintain control of the Association were set aside and a new Board was elected following a properly noticed and conducted Association meeting. Plaintiffs are also being awarded a Declaratory Judgment with respect to Count II, this Court having

concluded that the restrictions and covenants pertaining to age of ownership and occupancy of the units are legal and enforceable under applicable state and federal statutes. The Court will order that the judgment on Count II be entered immediately as it is separable from the other remaining issues and no just reason for delaying entry of judgment on this cause of action exists. The best interests of all affected parties will be served when finality has been achieved as to Count II.

The Court therefore concludes that Plaintiffs are the prevailing parties with respect to the issues raised under the Fair Housing Act, the Minnesota Human Rights Act, and the Minnesota Common Interest Ownership Act. As the prevailing parties, they are entitled to an award of attorney fees and costs against M.A. Fearing Companies, Inc., and Progressive Real Estate, Inc., as the Declarant, successor Declarant, and Developer.

NOW, THEREFORE, IT IS ORDERED:

1. Plaintiffs' motion for summary judgment as to Count II is **GRANTED**. A separate Order shall be entered incorporating this Memorandum, Conclusion, and Order, setting forth the full nature of the Declaratory Judgment being entered herein, which Order may be served on all interested parties, landowners, and occupants, and duly recorded as deemed appropriate.

2. Defendants' motion for summary judgment on Count II is **DENIED**.

3. Defendants' motion for summary judgment and/or dismissal of Count I is **DENIED**. There are issues of material fact which preclude consideration of Count I on a motion for summary judgment.

4. Defendants' motion for dismissal of Count III for failure to state a claim upon which relief can be awarded is **GRANTED**.

5. Defendant Fearing's motion for summary judgment as to her counterclaim for expenses is **DENIED**.

6. Plaintiffs' motion for dismissal of Defendant Fearing's counterclaim is **GRANTED** based on the Minnesota Statute of Frauds.

7. Plaintiffs' motion for summary judgment on Count IV is **DENIED**. There are issues of material fact which preclude consideration of Count IV on a motion for summary judgment.

8. Defendants' motion for summary judgment on Count. IV is **DENIED**.

9. Plaintiffs' motion for an award of attorney fees and costs as the prevailing parties on Count II is **GRANTED**, and judgment shall be entered against Defendants M.A. Fearing Companies, Inc., and Progressive Real. Estate Inc., in the amount of $33,065.12 in legal fees and costs plus post-judgment interest as allowed by law.

10. Pursuant to Minn. R. Civ. Proc. Rule 54.02, a final judgment in favor of Plaintiffs, and against Defendants shall be entered on Count II. There is no just reason for delay and in the interests of all parties, finality on this primary cause of action is warranted. Further delay pending resolution of the remaining separable issues would be unjust and would lead to further conflict within the community of Lake St. Croix Villas.

11. The Washington County Court Administrator shall mail a copy of this Order by U.S. Mail to the attorneys for the above-named parties. Such mailing shall constitute due and proper service of this Order, for all purposes.

Based upon the foregoing, the Court makes the following:

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 30, 2004

s/_____
Mary E. Carlson
Judge of District Court

Pursuant to Rule 58, Civil Rules of Procedures; I hereby certify that the above Order constitutes the judgment of this Court.

Christina M. Volkers
Court Administrator

Date: 4-30-04 By: s/_____
Beverly Gettes

This opinion will be unpublished and may not be cited except as provided by Minn. star. § 480A.08, subd..3 (2004).

STATE OF MINNESOTA
IN COURT OF APPEALS
A04-1191

Mary Parr, et al.,
Respondents,

vs.

Marlene Fearing, et al.,
Appellants,

Theodore Perlinger, et al.,
Defendants.

Filed March 15, 2005
Affirmed
Klaphake, Judge

Washington County District Court
File No. C0-03-3415

Jon E. Kingstad, Lake Elmo Bank Building, Suite 260, 600 Inwood Avenue North, Oakdale, MN 55128 (for respondents)

Mark J. Kallenbach, 2260 Ridge Drive, Suite 13, Minneapolis, MN 55416 (for appellants)

Considered and decided by Klaphake, Presiding Judge, Kalitowski, Judge, and Peterson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellants, who included Marlene Fearing, the developer of a common-interest senior housing development and former president of its homeowner's association, appeal from the district court's grant of partial summary judgment. The judgment granted declaratory relief, dismissed appellant Fearing's counterclaim, and awarded attorney fees and costs to respondents.

Because we conclude that the district court did not abuse its discretion in its award of attorney fees and did not err in its application of the law, we affirm.

FACTS

In May 2003, respondents, the Lake St. Croix Villas Homeowners Association and several of its members, brought the present action against appellants Marlene Fearing, M.A. Fearing, Progressive Real Estate, Transaction Real Estate, and other affiliated real estate interests, including owners who were renting out their units. Respondents alleged that appellants were converting or attempting to convert the Lake St. Croix Villas from a common-interest senior housing development into a joint venture for real estate and rental property investment Appellants denied the allegations and asserted that the restrictive covenants regarding age and occupancy were illegal and unenforceable under federal and state law.

On April 30, 2004, the district court ordered judgment on cross-motions for summary judgment This appeal involves the district court's grant of three of respondents' motions. The first involves the district court's award off attorney fees and costs to respondents it connection with the grant of declaratory relief. The second issue on appeal is the court's grant of declaratory relief to the effect that the Lake St. Croix

Villas were established and remain in compliance with state and federal law as "housing for older persons." The third issue is the district court's grant of respondents' motion to dismiss a counterclaim filed by Fearing seeking compensation for expenses allegedly paid on behalf of the association.

DECISION

1. Attorney Fees

We will not reverse a district court's award of attorney fees absent an abuse off discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The reasonable value of counsel's work is a question of fact and must be upheld unless that value is clearly erroneous. *Amerman v. Lakeland Deer Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973).

Respondents sought attorney fees pursuant to the Minnesota Common Interest Ownership Act (MCIOA), which gives a "claim for appropriate relief' to persons adversely affected by the violation of "any provision of the declaration, bylaws, or rules and regulations." Minn. Stat. § 515B.4-116(a) (2002). The MCIOA provides further that "[t]he court may award reasonable attorney's fees and costs of litigation to the prevailing party." Minn. Stat. § 515B.4-116(b). The court here considered respondents' claim for attorney fees solely with respect to their request for a declaratory judgment, because their other claims were either dismissed or had yet to be resolved. The court awarded respondents $33,065.12 "in legal fees and costs plus post judgment interest."

Appellants first argue that an award under Minn. Stat. § 515B.4-116 was improper because any claim for a breach of an obligation under the express or implied warranty

provisions of the MCIOA "shall be commenced within six years after the cause of action accrues." Minn. Stat. § 515B.4-115(b) (2002). But this is not a warranty action. Because the statute of limitations cited by appellants does not apply to the action before us, appellants' argument is without merit.

Appellants also dispute the amount of the attorney-fee award as excessive and as if not supported by the evidence. Appellants first claim that no statement or other evidence for fees was affixed to a particular affidavit filed by respondents and dated March 24, 2004. But the record contains another affidavit dated April 13, 2004, which included as an attached exhibit detailed billing invoices from respondents' attorney with a cumulative value of over $50,000. Appellants next argue that it is inconceivable that respondents' attorney could have incurred 220 hours in connection with the request for declaratory judgment and that any evidence of his services was legally insufficient because it was not accompanied by an affidavit affirming its accuracy. Appellants, however, provide no legal support for this argument, nor do they provide any context for their assessment that the number of hours billed was, in their words, "ludicrous." The district court considered a series of invoices and parsed the billings according to what it determined were the reasonable expenses related to the prosecution of the declaratory judgment, and appellants have not demonstrated that this valuation was clearly erroneous. We therefore conclude that the district court did not abuse its discretion in awarding attorney fees.

2. Declaratory Judgment

On appeal from a declaratory judgment, we apply a clearly erroneous standard to the district court's factual findings, but review its determination on questions of law de novo. *Rice Lake Contracting Corp. v. Rust Env'l &*

Infrastructure, Inc., 549 N.W.2d 96, 98-99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). Appellants do not maintain that material facts remain in dispute, but take issue with the district court's interpretation of the Fair Housing Act, 42 U.S.C. § 3607 (2000). We need not defer to the district court's application of the law when the material facts are not in dispute. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). We review de novo the district court's interpretation of a statute. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996).

In 1993, appellant Fearing, acting as M.A. Fearing Company, obtained approval of a planned-unit development in the City of Lake St. Croix Beach (the city). Soon thereafter, Fearing incorporated the Lake St. Croix Villas Homeowners Association (the association), filed a declaration of covenants with Washington County, and entered into a developer's agreement with the city. The developer's agreement stated that Fearing had secured permission

> to construct three single family residences and eight side-by-side (common wall) duplex like structures, designed ... to be marketed to seniors (person of 55 years of age or greater) with the expressed purpose of providing a market for housing needs to the elderly and senior members of Lake St. Croix Beach community. All of these dwelling units are to be occupied by no more than two adults each[.]

The association's by-laws stated that the units were "designed for mature adult[s]." The declaration of covenants stated further that each unit "must be owner occupied."

Four duplexes housing eight units were constructed and sold between 1995 and 1999. The district court found that

Fearing's sales brochure marketed the units as "housing for seniors" and included the claim that NA. Fearing Companies created an adult community that is better suited to accommodate the seniors' changing needs in housing[.]" Of those first eight units, six were sold to parties over 55, one was sold to a party younger than 55, and one was occupied by Fearing herself, who was also under 55 at the time of occupancy. During the first phase of construction, appellant M.A. Fearing Company was involved in multiple mechanic's lean foreclosures, and it ultimately filed for and obtained bankruptcy protection. M.A. Fearing Company sold the remaining lots to appellant Progressive Real Estate, another corporation owned and controlled by Marlene Fearing,

No units were built between 1999 and 2001. The remaining four duplexes were constructed in 2002, after progressive sold the vacant lots on a contract for deed to appellant Transaction Real Estate. All but one of the eight units were sold, and most of the occupants of these duplexes are much younger than 55 and/or do not own the unit they occupy. The three single-family lots have not been developed, and ownership reverted to Progressive for nonpayment after Fearing failed to obtain approval of duplex construction on those lots from the city.

In June 2003, respondents obtained a court order mandating a court-supervised meeting to elect board members to the homeowners association. During the meeting Fearing was replaced as president of the association, and the association has since taken action to enforce the covenant's restrictions on owner-occupancy.

The district court subsequently issued its declaratory judgment based upon its interpretation of the Fair Housing Act, 42 U.S.C. § 3607 (2000), the MCIOA., Minn. Stat. §§

515B.1-101 - .4118 (2002), and the Minnesota Human Rights Act, Minn. Stat. § 363.03 (2002). The district court found that the association's restrictions on ownership and occupancy were valid and consistent with the exemption for "housing for older persons" provided by the Fair Housing Act from the general prohibition of discrimination on account of family status. Under the Fair Housing Act, Congress defined three categories of "housing for older persons" including housing "intended and operated for occupancy by persons 55 years of age and older," qualified by the following requirements:

> (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
> (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
> (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall--
>
> > (I) provide for verification by reliable surveys and affidavits; and
> > (II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

42 U.S.C. § 3607 (b)(2)(C) (2000).

Fearing argues that the district court should have applied the federal statute as it existed when the first units were sold and not as later amended. *Compare* 42 U.S.C. § 3607(b)(2)(C)

(1994) *with* 42 U.S.C. § 3607(b)(2)(C) (2000) (provision amended in 1995 to strike out requirement of "the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons"). Fearing also argues that, regardless of which version was relevant, the district court misapplied the statute. But given the record before us, we conclude that Fearing is estopped from making these arguments.

"Estoppel is an equitable doctrine addressed to the discretion of the court and is intended to prevent a patty from taking unconscionable advantage of his own wrong by asserting his strict legal rights." *N. Petrochemical Co. v, U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1.979). Because Fearing failed to guide the association consistent with its principles, the district court determined that she was estopped from disputing the association's intent and compliance with 42 U.S.C. § 3607(b)(2)(C)(ii) & (iii); Fearing does not challenge this estoppel determination on appeal. Similarly, we conclude that because Fearing failed to enforce the restrictive covenants, she is also estopped from gaining advantage by claiming that the development may now have less than 80% occupancy by older persons. As the court stated in construing the 80% requirement: "To hold otherwise would allow a developer to unilaterally modify the senior housing community by selling units in violation of the age and occupancy restrictions causing the community to lose its [Fair Housing Act) exemption."

We find support for our estoppel holding in the Minnesota Nonprofit Corporation Act (MNCA), Minn. Stat. § 317A.001--909 (2002), under which Fearing organized the homeowners association in 1994. The MNCA provides that the duties of officers can be defined by the articles and bylaws

of the association. Minn. Stat. § 317A.305, subd. 1. The MNCA further provides that "[a] director shall discharge the duties of the position of director in good faith [and] in the best interests of the corporation." Minn. Stat. § 317A.251, subd. 1. The record clearly shows that Fearing intended the development to be a senior housing community, and she does not dispute that she made such representations to respondents. "It is elementary law that one who...intentionally...induces another to believe that certain facts exist is estopped to deny the existence of such facts where to do so would prejudice the other party." *Suske v. Straka*, 229 Minn. 408, 416, 39 N.W.2d 745, 751 (1949).

For these reasons, we affirm the district court's declaration that the association's restrictions on ownership and occupancy are, for purposes of the present litigation, valid and consistent with state and federal prohibitions against discrimination on account of family status.

3. Dismissal of Counterclaim

We will reverse a district court's dismissal of an action for failure to state s. claim on which relief can be granted only if we are convinced that the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997).

The district court granted respondents' motion to dismiss Fearing's counterclaim that she was owed $28,750 by the association for expenses she allegedly paid on its behalf. The court found Fearing's claim insufficient in light of the statute of frauds, Mint. Stat. § 513.01 (2002), because she failed to produce any written documentation of the agreement. Fearing argues in her appellate brief that "Association minutes containing her agreement with the Association [are] in the

possession of the Respondents, who have refused to provide Association minutes to the Appellants." But her December 2, 2003 counterclaim, and the answer to respondent's amended complaint which it incorporated by reference, contain no allegation of refusal to produce documents and make no reference to an "agreement, or some note or memorandum thereof, expressing the consideration ... in writing" as required by the statute of frauds for a promise to answer for a debt. *Id.*

Because Fearing's counterclaim fails to set forth a legally sufficient claim for relief, we affirm the district court's grant of respondents' motion to dismiss the counterclaim.

Affirmed.

STATE OF MINNESOTA
IN SUPREME COURT

A04-1191

Mary Parr, et al.,
Respondents,

vs.

Marlene Fearing, et al.,
Petitioners,

Theodore Perlinger, et al.,
Defendants.

ORDER

Based upon all the files, records and. proceedings herein,

IT IS HEREBY ORDERED that the petition of Marlene Fearing, et. al., for further review be, and the same is, denied.

Dated: May 17, 2005

BY THE COURT:

s/

Alan C. Page
Associate Justice